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IN THE

Supreme Court of the United States

October Term, 1948

No. 275 + 119 MISC.

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

No. 276 + 120 MISC.

L. M. PARKER,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

PETITIONS FOR WRITS OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS AND FOR A WRIT OF PROHIBITION TO THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AND BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

October Term, 1948

No., Miscellaneous

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

No., Miscellaneous

L. M. PARKER,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

MOTION FOR LEAVE TO FILE PETITIONS FOR WRITS OF PROHIBITION

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Jessie A. Kilpatrick, a resident of Alabama and L. M. Parker, a resident of Texas, move the

Court for leave to file the Petitions hereto annexed for Writs of Prohibition, pursuant to Section 1651 of the new Judicial Code and further move that orders and rules be entered and issued directing the District Court for the Northern District of Texas, to show cause why a Writ of Prohibition should not be issued to said Court in accordance with the prayer of said petitioners and why the petitioners should not have such other and further relief as may be just in the premises.

Dated, September 15, 1948.

JESSIE A. KILPATRICK

L. M. PARKER

Petitioners

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Counsel for Petitioners

IN THE

Supreme Court of the United States

October Term, 1948

No.

JESSIE A. KILPATRICK,

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L. M. PARKER,

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Respondent.

PETITIONS FOR WRITS OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS AND FOR A WRIT OF PROHIBITION TO THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AND BRIEF IN SUPPORT THEREOF

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement

This petition is respectfully submitted for the purpose of enabling the Court to pass upon the entire conflict in jurisdiction and venue now existing as a result of the refusal of the District Court for the Northern District of Texas and the Circuit Court of Appeals for the Fifth Circuit to permit a dismissal of actions commenced by the Petitioners in the District Court for the Northern District of Texas following a decision of the Circuit Court of Appeals in the Second Circuit in the case of *Jessie A. Kilpatrick* v. *The Texas and Pacific Railway Company*, 166 F. (2d) 788. The Texas and Pacific Railway Company has petitioned for certiorari to the Circuit Court of Appeals for the Second Circuit, said petition and brief in support thereof being No. 839 and 840 in the October 1947 Term of this Court.

Petition

Jessie A. Kilpatrick and L. M. Parker, jointly pray for the issuance of writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, to bring up to this Court an appeal by Petitioners now pending in said Court prior to submission, hearing or judgment, from proceedings in the District Court for the Northern District of Texas, and for a writ of prohibition to the District Court for the Northern District of Texas upon the ground that it has been divested of its jurisdiction over the action there pending.

Summary Statement of Matter Involved

Principal Questions Passed on by the District Court

The District Court determined that it could deny to the plaintiffs the privilege of venue selection given by Section 6 of the Federal Employers' Liability Act (45 U. S. C. A., 56) by refusing to allow a dismissal of said actions without prejudice either with or without terms and in so doing applied the doctrine of *forum non conveniens*.

The District Court has also decided that it can and will proceed with the trial of said actions in spite of the fact that an appeal was perfected to the Circuit Court of Appeals for the Fifth Circuit from the order denying to the plaintiffs the right to dismiss their actions.

Proceedings in the Circuit Court of Appeals

Appeals are presently pending in the Court of Appeals for the Fifth Circuit from that portion of an order of the District Court which denied the plaintiffs' motions to dismiss without prejudice. After the appeals had been perfected, the plaintiffs presented to the Circuit Court of Appeals for the Fifth Circuit petitions for writs of prohibition, being numbers 12298 and 12299, in that Court, and on April 13, 1948 the petitions were denied in a *Per Curiam* opinion which is as follows:

> "Petitioners, plaintiffs in separate suits in the court below, moved there for a dismissal without prejudice of their suits. Their motions denied, each filed notice of appeal. Alleging that respondent notwithstanding their appeals had set the causes for trial and, unless prohibited from doing so, would proceed to trial in them, each has filed a petition for writ of prohibition."

"This court may issue writs of prohibition only in aid of its jurisdiction to review final decisions of the district courts. It appears from the motion papers and the answers thereto that petitioners' attempted appeals from orders denying dismissal are not from final judgments. It is quite plain that this court is without jurisdiction to consider the merits of the questions sought to be raised in the applications for the writs and that for want of jurisdiction the petitions must be denied."

In a footnote the following authorities were cited: 28 U. S. C. A. 225; *Smith* v. *Whitney,* 116 U. S. 167; *In Re: The Petition of United States,* 263 U. S. 389; *Roche* v. *Evaporated Milk Ass'n.,* 319 U. S. 21; *Grand Trunk Western R. Co.* v. *McHie,* 100 F. (2d) 86; *Atlantic Coast Line R. Co.* v. *Winn,* 227 Fed. 50; *Heike* v. *U. S.,* 217 U. S. 423.

Summary of Facts

Although separate but substantially identical records are being filed in these two cases, a joint brief will be employed for the purpose of brevity and convenience. Record references are to the Kilpatrick record only.

Although Petitioners were injured in separate accidents, all questions of law and procedure involved in these two petitions are identical. Except for the dates of the accidents (Kilpatrick, November 20, 1946; Parker, July 13, 1946) the significant chronology is the same, and the only other dissimilarity of conceivable relevance pertains to Kilpatrick's citizenship and residence in Alabama and that of Parker in Texas.

While these men were employed in interstate commerce by The Texas and Pacific Railway Company at Big Spring,

Texas, they were involved in accidents, and Kilpatrick lost both of his legs while Parker lost one leg.

Both plaintiffs filed suits in the United States District Court for the Southern District of New York on December 23, 1946. For a history of the proceedings in that Court, we respectfully refer to the opinion of Judge Hand in the Circuit Court of Appeals for the Second Circuit, reported at 166 F. (2d) 788, and the opinions of the District Court reported at 72 F. Supp. 635 and 72 F. Supp. 632. As heretofore indicated, this petition is correlated to a petition for certiorari and brief in support thereof arising from the litigation in the Second Circuit bearing the title "The Texas and Pacific Railway Company, Petitioner, vs. Jessie A. Kilpatrick, Respondent", being Nos. 839 and 840 in the October 1947 Term of this Court.

For the purpose of chronological continuity, we merely repeat here that the actions in the New York Court were commenced on December 23, 1946; that after elaborate procedural difficulties the cases were dismissed on July 16, 1947 (72 F. Supp. 635); that an appeal was taken to the Circuit Court of Appeals and the judgments of dismissal were reversed on March 4, 1948 (C. C. A. 2, 166 F. (2d) 788).

On September 12, 1947, and approximately nine months after instituting the New York actions, the plaintiffs filed additional actions in the United States District Court for the Northern District of Texas (R. 1, 7). On October 4, 1947, the defendant filed its answers consisting of admissions and denials, but containing no counterclaim or prayer for affirmative relief (R. 8, 10). Various depositions were taken in Texas in December, 1947 (R. 10). On March 9, 1948 (R. 25), being five days after the decision of the Second Circuit Court of Appeals, and one day after plaintiffs' counsel became familiar with its nature (R. 27, 28)

motions to dismiss the Texas actions were served and filed (R. 25). The previous day, March 8, 1948, defendant had filed in each case a "Petition for Declaratory Judgment" which alleged that on the complaint and answer an "actual controversy" existed, and which moved for "appropriate relief" based on the legal rights and relations of the parties (R. 24).

On March 15, plaintiffs filed motions to strike defendant's petitions for declaratory judgment (R. 47). Plaintiffs also moved for a general continuance until the New York proceedings could culminate in a final judgment (R. 57). The trial court denied the general continuance (R. 65) and also denied both plaintiffs' motions to strike the petitions for declaratory judgment and their motions to dismiss without prejudice (R. 48).

Thereafter plaintiffs perfected appeals to the Fifth Circuit Court of Appeals, where the cases are now pending, from that portion of the order denying their motions to dismiss without prejudice (R. 49, 55).

Basis of Court's Jurisdiction

The jurisdiction of this Court is invoked pursuant to Sections 240(a) and 262 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347, 377).

The new Federal Judicial Code (Title 28, U. S. Code, Sections 1254(1), 1651(a), 2101(d)) provides as follows:

> SECTION 1254 provides that the Supreme Court may review by certiorari any civil case in the Circuit Court of Appeals either before or after rendition of judgment or decree.

SECTION 1651 provides that the Supreme Court may issue all writs necessary or appropriate in aid of its jurisdiction agreeable to the usages and principles of law.

SECTION 2101 provides that an application to the Supreme Court for certiorari to review a case before judgment in the Circuit Court of Appeals may be made at any time before judgment.

Questions Presented

The principal questions involved are these:

A. Whether this Court in the exercise of its power to issue all necessary writs (28 U. S. C. A. 377; Judicial Code 262) should assume jurisdiction of both the New York and Texas litigation between these parties and resolve in one decision the venue and jurisdictional conflict between the lower Federal courts.

B. Whether the court below erroneously denied plaintiffs the privilege of venue selection under Section 6 of the F. E. L. A. (45 U. S. C. A. 56) by refusing to allow dismissals without prejudice, either with or without terms, of the Texas actions.

C. Whether this Court should issue an appropriate writ under Section 262 of the Judicial Code (28 U. S. C. A. 377) to the Fifth Circuit Court of Appeals and the United States District Court for the Northern District of Texas, to protect the plaintiffs in the exercise of rights expressly granted by the Federal Employers' Liability Act.

Reasons Relied on for Allowance of Writs

In order to preserve jurisdiction over the entire conflict in venue arising from the New York and Texas litigation between the parties, it is essential that writs of certiorari and prohibition, or such other writ as may be appropriate, be issued so as to resolve the unseemly conflict between the lower Federal courts and to settle the important questions of jurisdiction, venue and procedure under the F. E. L. A. raised by this litigation.

This is an instance in which this Court should exercise its power of supervision by reason of the departures of the courts below from the accepted and usual course of judicial proceedings.

By refusing to permit petitioners the privilege to dismiss the Texas actions, the Texas courts have in effect deprived the plaintiffs of their choice of venue by an application of the doctrine of *forum non conveniens* in an F. E. L. A. case in disregard of and in violation of decisions of this Court in *Baltimore & Ohio R. R. Co.* v. *Kepner*, 314 U. S. 44, *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698 and *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501.

It is contrary to the invariable current of Federal authority to allow a carrier employer, in an action brought under the Federal Employers' Liability Act, to deprive an employee plaintiff of his right of dismissal without prejudice pursuant to Rule 41 of the Rules of Civil Procedure by using the device of a petition for declaratory judgment, this device in such instance being offensive to the entire purpose of the Federal Employers' Liability Act.

PRAYER

For the reasons outlined above, and discussed more in detail, and with supporting authorities in the accompanying brief, your petitioners pray that writs of certiorari, prohibition or such other writs as to this Court may seem just and appropriate, issue out of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit and to the United States District Court for the Northern District of Texas, commanding and directing said District Court to refrain from further proceedings in said causes, and commanding the Circuit Court of Appeals of the Fifth Circuit to certify and send to this Court the transcript of record in the case entitled *Jessie A. Kilpatrick, Appellant* v. *The Texas and Pacific Railway Company, Appellee,* being number 12330 in that court, and the case of *L. M. Parker, Appellant* v. *The Texas and Pacific Railway Company, Appellee,* being number 12344 in that court, and including all proceedings in said Circuit Court of Appeals with reference to a writ or prohibition being In Re: Jessie A. Kilpatrick, Number 12298 and In Re: L. M. Parker, Number 12299, to the end that no further proceedings shall be had or taken in either of the courts below until this Court may review and determine all questions of jurisdiction

and venue arising out of both the New York and Texas litigation between said parties.

JESSIE A. KILPATRICK

L. M. PARKER

Petitioners

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L. M. PARKER,

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THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITIONS FOR CERTIORARI AND PROHIBITION

Statement of the Case

The history and procedural aspects of the litigation is sufficiently covered in the petitions. In selecting the New York jurisdiction as their primary and original choice, the

plaintiffs relied on *Barnett* v. *The Texas and Pacific Railway Company*, Second Circuit, 145 F. (2d) 800, which was decided on November 29, 1944. This case definitely held that the defendant was subject to suit and amenable to process in the United States District Court for the Southern District of New York.

Relying thereon, the plaintiffs exercised an important and valuable right expressly granted to them by the Congress of the United States. All of their further efforts have been in the defense and in the assistance of that right, together with the taking of precautionary measures not inconsistent with its exercise.

Specifications of Errors

The Texas Court erred:

1. In applying the doctrine of *forum non conveniens* to an F. E. L. A. case.

2. In effectuating a denial to the plaintiffs of their primary and original choice of venue in New York.

3. In depriving plaintiffs of their right to dismiss without prejudice under Rule 41.

4. In setting actions for trial after filing and perfection of appeals from orders denying dismissal.

ARGUMENT

POINT I

This Court has power to issue all necessary writs in aid of its appellate jurisdiction.

The Supreme Court is empowered, by Section 262 of the Judicial Code (28 U. S. C. A. 377) and after September 1, 1948 by Title 28, U. S. Code, Section 1651, to issue all writs necessary or appropriate in aid of its appellate jurisdiction agreeable to the usages and principles of law. The supervisory power of this Court under this statute over a district judge was affirmed in *Ex parte Republic of Peru*, 318 U. S. 578, where the Court pointed out that the writs afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction.

To the same effect see also *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4; *In Re*: *National Labor Relations Board*, 304 U. S. 486; *Berman* v. *U. S.*, 302 U. S. 211; *Draper* v. *Davis*, 102 U. S. 370; *Keyser* v. *Farr*, 105 U. S. 265.

That the Texas court has set these lawsuits for trial on October 18, 1948 unless restrained, is contrary to *Newton, et al.* v. *Consolidated Gas Co., of New York*, 258 U. S. 165, which declared the general rule that an appeal suspends the power of the court below to proceed further in the case.

POINT II

The filing of the notices of appeal and bonds under Rule 73 removed jurisdiction from the District Court.

In *Ring* v. *Spina*, 2 C. C. A., 166 F. (2d) 546, an order striking a cause from the jury calendar was held appealable as it was in substance the grant of an injunction against an action at law and reviewable under 28 U. S. C. A. 227, as interpreted by *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379 and *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188.

It would seem clear that a refusal to permit a termination of litigation has the element of finality necessary for appealability although technically, as in *Ring* v. *Spina* (*supra*), the action continues. In practical effect the setting of a trial date also accomplishes the same result as would an injunction against the maintenance of the New York litigation.

That sole jurisdiction of these cases is now lodged in the Fifth Circuit Court of Appeals would appear from such cases as *Miller* v. *U. S.*, 114 F. (2d) 267; *Walleck* v. *Hudspeth*, 128 F. (2d) 343; *Bergeron* v. *Mansour*, 152 F. (2d) 27; *Crump* v. *Hill*, 104 F. (2d) 36; *U. S.* v. *Newbury Mfg. Co.*, 23 F. (2d) 473; *Lewis-Hall Iron Works* v. *Blair*, 23 F. (2d) 972; *The Washington*, 16 F. (2d) 206; *Casalduc* v. *Diaz Gonzalez*, 117 F. (2d) 915; *U. S.* v. *Radice*, 40 F. (2d) 445.

In one form or another, these decisions hold in substance that the filing of an appeal transfers all jurisdiction of the cause to the Appellate Court and that thereafter the lower court is without power or authority to take further proceedings, or make any further orders except to preserve the status quo.

Statute Involved

The statute involved is Section 6 of the Federal Employers' Liability Act (45 U. S. C. A., Section 56) which in relevant part provides:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Rule Involved

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides as follows:

> "*By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

POINT III

The court below erroneously denied plaintiffs the absolute right of venue expressly conferred by the Federal Employers' Liability Act.

The trial court was imbued with the normally sound philosophy that these cases should be tried where the defendant lives and the accident occurred (R. 65) and said "both reasons existed here" (R. 65). He said that the entire background of jurisprudence favors this (R. 65). But Congress in the Federal Employers' Liability Act with its special venue provisions, has decreed otherwise, and this Court has spoken unmistakably in the *Miles* and *Kepner* cases. The delay, complications and confusion now existing and the unseemly race and conflict before Federal tribunals in New York and Texas, have resulted from purely technical maneuvers employed by the defendant. Despite the "thicket" of procedure, the question is essentially simple. If jurisdiction exists in New York, the plaintiffs should be permitted to try their lawsuits there; if it does not, the cases should proceed in their secondary choice, in Texas.

Contrary to reason and uniform authority, the Texas court allowed defendant to deprive plaintiffs of the fruits of a long and expensive victory in the New York courts, employing a sham and meaningless counterclaim or petition for declaratory judgment to cut off their right to a voluntary non-suit or dismissal. This technical maneuver, transparent in purpose, would ordinarily have been rendered nugatory. *Stanley Works* v. *C. S. Mersick & Co.*, 34 F. Supp. 913.

In *Scruggs* v. *Casco Corp.*, 32 F. Supp. 625, such a counterclaim was described as unjustified and was called "a wholly redundant flourish appended to the answer". See

also *Cheney Co.* v. *Cunningham*, 29 F. Supp. 847; *Lambert* v. *Dempster Bros., Inc.*, 34 F. Supp. 610; *O'Leary* v. *Liggett Drug Co.*, 1 F. R. D. 272; *Oblak* v. *Armour & Co.*, 1 F. R. D. 648; *Dominion Electrical Mfg. Co.* v. *Edwin L. Wiegand Co.*, 126 F. (2d) 172.

Even the incidental annoyance of new or subsequent litigation (and this is absent here), has never been regarded as sufficient to destroy the traditional right of voluntary non-suit. It has never been the policy of the law in the absence of a bona fide counterclaim, to force an unwilling plaintiff to submit his case to some particular court. Rule 41 is declaratory of long established practice in this regard. *Home Owners Loan Corporation* v. *Huffman*, 139 F. (2d) 314.

In *Lyman* v. *U. S.*, 138 F. (2d) 509, a distinction was made between former and subsequent litigation in another court and it was held under Rule 41 that plaintiff should be permitted to dismiss "to prosecute any other timely proceeding upon the same subject matter now pending in another court."

See also *Lawson* v. *Moore*, 29 F. Supp. 175; *McCann* v. *Bentley Stores Co.*, 34 F. Supp. 234; *Huskey* v. *U. S.*, 29 F. Supp. 283; *Oblak* v. *Armour & Co.*, 1 F. R. D. 648; *Welter* v. *E. I. Dupont DeNemours & Co.*, 1 F. R. D. 551; *Taylor* v. *Swift & Co.*, 2 F. R. D. 424; *Ryerson & Haynes, Inc.* v. *American Forging & Socket Co.*, 2 F. R. D. 343; *U. S.* v. *Elm Spring Farm Co.*, 38 F. Supp. 508; *Gold* v. *George T. Moore Sons, Inc.*, 3 F. R. D. 201.

These cases affirm the right of a plaintiff, under Rule 41, to dismiss without prejudice under a variety of circumstances, sometimes with, and sometimes without, terms.

Certainly in an F. E. L. A. case the employee's right to dismiss should be relatively unimpeded and never completely extinguished.

It is unnecessary to cite to this Court its numerous decisions affirming that the rights of an injured plaintiff under the F. E. L. A. must be given a liberal and humanitarian interpretation. If Congress has "loaded the dice" in his favor, and permitted him to shop for a forum, it was only to offset and counterbalance the very great and numerous advantages possessed by the carrier in a case of this kind.

CONCLUSION

The preservation of harmony between lower Federal courts on questions of jurisdiction and venue, as well as the safeguarding of rights expressly granted by a Federal statute, are at issue. By exercising its undeniable power to issue the writs sought, the jurisdiction of this Court to pass on these important questions will be preserved and the entire subject matter may be reviewed.

Respectfully submitted,

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THE TEXAS AND PACIFIC RAILWAY COMPANY, *Respondent.*

No. 276
Misc. No. 120

L. M. PARKER, *Petitioner,*
—against—
THE TEXAS AND PACIFIC RAILWAY COMPANY, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND IN OPPOSITION TO PETITIONS FOR WRITS OF PROHIBITION TO THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

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Catlin v. United States, 324 U. S. 229, 233-234 (1945) 5

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Smith v. Whitney, 116 U. S. 167 (1886) 6

Other Authorities Cited

Rules of Civil Procedure

Rule 41 (a)(2) 1

Section 2101 (e) of the Federal Judicial Code (Title 28 U. S. Code) 6

IN THE

Supreme Court of the United States

October Term, 1948

No. 275
Misc. No. 119

JESSIE A. KILPATRICK, *Petitioner,*

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Respondent.*

No. 276
Misc. No. 120

L. M. PARKER, *Petitioner,*

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND IN OPPOSITION TO PETITIONS FOR WRITS OF PROHIBITION TO THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Statement

Petitioners seek, by their petitions for certiorari, to have this Court review, prior to any hearing or decision by the Circuit Court of Appeals for the Fifth Circuit, two orders entered in the District Court for the Northern District of Texas denying motions by petitioners, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, to dis-

miss the complaints. Petitioners also seek, by their petitions for writs of prohibition, to invoke the original jurisdiction of this Court to direct the District Court for the Northern District of Texas to proceed no further with the actions now pending in that Court on the ground that it has been divested of jurisdiction by reason of the appeals taken by petitioners to the Circuit Court of Appeals for the Fifth Circuit.

Respondent opposes the petitions for certiorari and the petitions for prohibition on the ground that this Court does not have jurisdiction to review the only orders which petitioners seek to have reviewed in this Court; namely, the orders of the District Court denying petitioners' motions to dismiss the complaints. Respondent contends, as the Circuit Court of Appeals for the Fifth Circuit has held,*

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* The full opinion of the Circuit Court of Appeals for the Fifth Circuit denying petitioners' petitions for writs of prohibition on April 13, 1948 in this case is as follows:

> "PER CURIAM: Petitioners, plaintiffs in separate suits in the court below, moved there for a dismissal without prejudice of their suits. Their motions denied, each filed notice of appeal. Alleging that respondent notwithstanding their appeals had set the causes for trial and, unless prohibited from doing so, would proceed to trial in them, each has filed a petition for writ of prohibition.
>
> "This court may issue writs of prohibition only in aid of its jurisdiction to review final decisions of the district courts.[1] It appears from the motion papers and the answers thereto that petitioners' attempted appeals from orders denying dismissal are not from final judgments.[2] It is quite plain that this court is without jurisdiction to consider the merits of the questions sought to be raised in the applications for the writs and that for want of jurisdiction the petitions must be denied.

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[1] 28 USCA 225; *Smith* v. *Whitney*, 116 U. S. 167; *In Re: The Petition of United States*, 263 U. S. 389; *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21.

[2] *Grand Trunk Western R. Co.* v. *McHie*, 100 F(2) 86; *Atlantic Coast Line R. Co.* v. *Winn*, 227 Fed. 50; *Heike* v. *U. S.*, 217 U. S. 423."

that the orders of the District Court are not final orders and, therefore, are not appealable. For want of jurisdiction the petitions for certiorari should be denied and the petitions for writs of prohibition should be dismissed.

ARGUMENT

I

The petitions for writs of certiorari should be denied because the orders which petitioners seek to have reviewed are not final orders.

The orders denying petitioners' motions to dismiss the complaints certainly are not final and appealable orders within the test laid down by this Court in the case of *Heike* v. *United States*, 217 U. S. 423, 428-429 (1910):

> "The construction of §5 of the Court of Appeals Act was before this court in the case of *McLish* v. *Roff*, 141 U. S. 661, 665, and it was there held that the allowance of appeals or writs of error under that section must be understood to have the meaning which those terms had always had under acts of Congress relating to the appellate jurisdiction of this court, and that taken in that sense appeals or writs of error could only be allowed in cases in which there had been a final judgment. Mr. Justice Lamar, who spoke for the court in that case, pointed out that under the Judiciary Act of 1789 no appeal would lie to this court except from final judgments or decrees, and further stated that this was only declaratory of the settled practice of England, where no writ of error would lie except from a final judgment; and if the writ was made returnable before such judgment it would be quashed, and in this connection, speaking for the court, the learned justice said:

'From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error * * * have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.'

McLish v. *Roff, supra,* has been followed and approved in this court. *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry.,* 148 U. S. 372; *Kirwan* v. *Murphy,* 170 U. S. 205, 209; *Ex parte National Enameling Co.,* 201 U. S. 156.

It may, therefore, be regarded as the settled practice of this court that a case cannot be brought here by piecemeal, and is only to be reviewed here after final judgment by direct appeal or writ of error in a limited class of cases under §5 of the Court of Appeals Act.

It is unnecessary to enter upon a full consideration of what constitutes a final judgment, a subject of much discussion. The definition of a final judgment or decree was tersely stated by Mr. Chief Justice Waite in *St. Louis, Iron Mountain & S. R. R. Co.* v. *Express Co.,* 108 U. S. 24, 28, in these terms: 'A decree is final for the purposes of an appeal to this court when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.'"

By no possible construction can it be said that the orders of the District Court denying petitioners' motions to dismiss the complaints terminate the litigation between the parties on the merits and leave nothing to be done but to enforce by execution what has been determined. The District Court, in denying petitioners' motions to dismiss the complaints, simply held that the cases should proceed to trial.

The rule that non-final orders of the character of those which petitioners seek to have this Court review are not appealable, has been rigidly adhered to without exception in the Federal courts.

Catlin v. *United States*, 324 U. S. 229, 233-234 (1945);
Libby, McNeil & Libby v. *Malmskold*, 115 F(2d) 786 (CCA 9th (1940));
Grand Trunk Western Railroad Company v. *McHie*, 100 F(2d) 86 (CCA 6th (1938));
Beighle v. *Le Roy*, 94 F(2d) 30 (CCA 3rd 1938);
Atlantic Coastline Railroad Company v. *Winn*, 227 Fed. 50 (CCA 5th 1915);
Merriman v. *Chicago & E. I. R. Co.*, 64 Fed. 535 (CCA 7th (1894)).

In the case of *Libby, McNeil & Libby* v. *Malmskold*, *supra*, the Court stated (p. 787):

> "It seems too plain for argument that the denial of a motion for a nonsuit or to direct a verdict is not a final decision. *So also as to a motion to set aside a verdict or to dismiss without prejudice.*" (Italics added.)

II

The petitions for writs of prohibition should be dismissed because the District Court clearly has exclusive jurisdiction over the actions now pending in that Court.

The *per curiam* opinion of the Circuit Court of Appeals for the Fifth Circuit* in denying the petitions for writs of

* This opinion is set forth in full at page 2, *supra*.

prohibition filed by petitioners in that Court constitutes a convincing statement of why the petitions for prohibition should be denied by this Court.

Moreover, it repeatedly has been held by this Court and by other Federal courts that the writ of prohibition is an extraordinary remedy, reserved for "really extraordinary causes", and is not to serve the office of an appeal.

Ex parte Fahey, 332 U. S. 258 (1947);
Ex parte United States, 263 U. S. 389 (1923);
Smith v. *Whitney*, 116 U. S. 167 (1886);
Poliszek v. *Doak*, 57 F(2d) 430 (App. D. C. 1932).

III

Petitioners' motion for a stay of proceedings in the District Court for the Northern District of Texas should be denied because this Court has no jurisdiction with respect to the Texas actions.

The power of this Court to stay proceedings in a case in which a petition for certiorari is pending in this Court is defined in 28 U. S. C. §2101(e) as follows:

> "(e) In any case in which the *final judgment or decree* of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order

granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay." (Italics added.)

Inasmuch as the orders which petitioners seek to have reviewed in this Court are not final orders and therefore are not appealable, it is abundantly clear that this Court has no jurisdiction with respect to those orders and, accordingly, has no power to stay proceedings in the District Court actions as requested by petitioners.

CONCLUSION

The petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit should be denied; the petitions for writs of prohibition to the District Court for the Northern District of Texas should be dismissed; and petitioners' motion for a stay of proceedings in the District Court for the Northern District of Texas should be denied.

Dated: Fort Worth, Texas, October 1, 1948.

Respectfully submitted,

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October 1, 1948